IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-968

THE DETROIT EDISON COMPANY
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent.

REPLY BRIEF OF PETITIONER THE DETROIT EDISON COMPANY

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I

THE BOARD'S BRIEF FAILS TO DISCLOSE THE RELEVANCE OF THE TEST MATERIALS

In seeking to establish the relevance of the test materials, the Board's brief first attempts the "short" answer (Bd. br., p. 16) that the Company is foreclosed from making the relevance argument at all with respect to the tests. This argument was fully answered in the Company's initial brief (Co. br., pp. 48-49).

When forced to supply a response on the merits of the relevance issue, the Board's brief fares no better. The factual centerpiece of the Board's position is that the test battery measures specialized, acquired knowledge required of an instrument man and that the Union needed the tests to determine whether the test

questions "called for specialized knowledge beyond the requirements of the instrument man job, or which did not fairly measure the aptitude of certain classes of applicants" (Bd. br., pp. 21, 22, 38). The problem with this premise is that it is factually incorrect. As found by both the arbitrator and the Administrative Law Judge, the test battery does not measure specialized, acquired knowledge required of an instrument man, but rather the *aptitude* of a person to *become* an instrument man.[1]

The second and related factually erroneous premise of the Board's brief is the repeated assertion, without benefit of record reference, that the Union was not challenging the validity of the test battery (Bd. br., pp. 12, 13, 18, 23, 31, 40). The record discloses no such disclaimer by the Union. The Union's initial written request specified no reason at all for the information request (A. 121). The second Union request specified that "what this advocate needs to know is if the questions on these tests are reasonably relevant to the job being considered" (A. 124). At the unfair labor practice hearing, the Union representative testified that he needed the test battery because it was "an entirely new dimension" (A. 24), and that he had to know "the reasonable relevance of the tests to the job" (*Ibid.*). On cross-examination, the Union representative ad-

[1] The Administrative Law Judge found specifically that "these tests are not designed to test the skills or knowledge of the applicant which may be related to the job, but the capacity or aptitude of the employee to be trained and to do the job efficiently" (P.A. 22a). And the arbitrator found that "face validity does not prove or disprove the validity of the test in determining the aptitudes necessary for successful job performance. There would be justification in the Union's request if the test were measuring job knowledge" (P.A. 72a).

mitted that he wanted to see the tests to determine their "face validity" (A. 27).[2] At the arbitration proceeding, the Union representative was even more pointed: "So our position is that the tests are discriminative [sic]. Therefore management is arbitrary and capricious" (A. 157); and again, "It's [referring to the test battery] an obstacle. It's an impediment" (A. 158). The Board itself in its Reply Brief in the Court of Appeals acknowledged that the Union was disputing the validity of the test battery. On that occasion, the Board stated:

> "Rather this is a case where 'test validity' is in issue and the Company has asserted that the test is valid on the basis of criterion related validity studies. *The Union has chosen to contest the validity of the tests* on the basis of content validity and possibly construct validity" (Bd. Reply Brief in Sixth Circuit, p. 5) (emphasis added).

Thus the twin postulates of the Board's relevance argument—that the tests measured acquired skillls necessary for the instrument man job and that the Union didn't challenge the validity of the test battery—are both factually erroneous. These errors reduce the Board's argument to a plea for the right of the Union to view a test battery which measures only a person's aptitude to perform the instrument man job in an effort to challenge the validity of the test.[3] Since the test bat-

[2] Face validity is the appearance to a layperson of the relation between the test item and the requirements of the job (A. 201).

[3] The Board's brief is ambivalent on the validity of the test battery. While assuring the reader at several points that the validity of the test battery is not in issue, the brief implies that the high correlation between good results on the test battery and good performance on the job is no different than the positive correlation between teacher's salaries and the consumption of liquor (Bd. br.,

tery measures aptitude and not the acquired skill needed for the job, there may be no apparent relationship between each test item and the specific knowledge that an instrument man must have to perform the job. Thus an examination by the Union of the individual items on the aptitude test would, as the Arbitrator held, prove nothing (P.A. 72a).

The "fall back" position of the Board apparently is that even if the test battery is valid in predicting job performance, some applicants who score poorly on the test may become successful instrument men. That, of course, is true in any aptitude test program where the correlation coefficient is less than perfect, but it begs the question of the Union's necessity to see the actual test battery. The present case provides an excellent example of how the inevitable conflict between test scores and other job attributes are resolved on a basis that is practical and equitable to all parties. In his decision the Arbitrator ruled that the Company should re-examine certain employees who failed to meet the cutoff score to determine whether there was something in the person's background that might tend to offset his lower score. This is the safety valve that assures that the test battery is not used to "rule out particular applicants who were nonetheless capable of performing the job" (Bd. br., pp. 21-22, n. 16). And yet it is evident from the arbitration proceeding that the equi-

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p. 20, n. 14). That observation overlooks the fact that the validation study performed in this case ranked the incumbents on the job with reference to 23 specific, objective job functions, and that the relationship between test performance and job performance was hypothesized in advance, based on scientific research, as opposed to the "chance" relationship between the consumption of liquor and teacher's salaries.

table resolution of these individual cases can be achieved without the necessity of disclosure to the Union of tests and test scores.

A related "fall back" position of the Board apparently is that even though the test battery may be statistically valid, it may not be "fair" to certain employees and that the Union should be allowed to screen the tests to determine whether they "ought to be amended in certain particulars" (Bd. br., p. 19). There was no evidence in the record that the Union was qualified in any way to co-author the test items since, once again, the test measured aptitude, not acquired skills. Nor is there any room in this case for a distinction between "validity" and "fairness". In fulfillment of its good faith bargaining obligation, the Company has been more than "fair" to the Union by providing to the Union a wealth of information concerning the Company's testing program. Yet the Board and its current brief writers seek to extend this obligation to unreasonable and unprecedented limits by requiring disclosure of test information which is entirely unnecessary to the fulfillment of the Union's responsibility. The Board's brief also ignores the fact that ultimate fairness was achieved in this case by the accommodation reached in the grievance and arbitration process between the interests of the Company, the Union and the employees.

II

THE BOARD'S ARGUMENT THAT ITS "PROTECTIVE" ORDER WILL INSURE THE SECURITY OF THE TEST MATERIALS IS NOT PERSUASIVE

Stripped to its essentials, the Board argument is that its "protective" order is sufficient to safeguard the integrity of the tests. Only the premise of the argument

is correct. That premise, tucked away in footnote 25 of the Board's brief, is that there is a "strong public policy in favor of preventing the compromise of employment tests". The Board's conclusion to that premise is to wave the magic wand of a "protective" order over the test materials, thereby once again leaving it to the overburdened federal courts to sort out the many problems inherent in such an order. Those problems were adequately set out in the Company's initial brief (Co. br., pp. 39-43). The Board's response to those problems is similar to a person's attempt to stop holes in a dam with its fingers. It simply doesn't work. There remain substantial doubts (1) whether the Union is even subject to the "protective" order since it was not a party to the Court of Appeals proceeding, (2) exactly what persons would be permitted to view the materials, (3) whether the Union's interest in promotion by seniority alone would motivate it to discredit the Company's testing program,[4] (4) whether persons who viewed the tests might thereafter be entitled to take the tests,[5] (5) whether disclosure of the test materials would violate the EEOC Guidelines on testing, (6) whether inadvertent disclosure would be actionable,[6]

[4] The Board's brief accuses the Company of an "assumption" that the Union prefers promotion by seniority alone. That "assumption" is contained in the uncontradicted testimony of the Company's Director of Union Relations in this case (A. 160-169).

[5] The Board's assumption in its brief (Bd. br. p. 35) that the Company could extract a pledge from Union officers that they would not bid on any jobs where they had viewed the tests would likely be viewed by the Board itself as unlawful discrimination based on Union activity in violation of Section 8(a)(3) of the Act.

[6] The Board's citation of *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 197 (1949), for the proposition that inadvertent disclosure would be actionable does not meet the point, since the holding of that case was merely that "willfulness" is not required to find civil contempt. We are, moreover, puzzled by the reference to page 197 of that decision, which is a portion of the dissenting opinion.

(7) whether disclosure would violate the APA Code of Ethics which is incorporated in the laws of many States, (8) whether there is any adequate remedy for a violation of the order, and (9) whether other companies faced with similar demands for test information will have to individually litigate through the Board and Court processes to obtain similar judicial "protection" against disclosure.

There are simply too many holes in the dam and not enough fingers.

In an attempted justification of the "protective" order, the Board's brief claims that it resulted from a balancing of the employee's interest in having the test information provided to the Union with the employer's interest in not having the materials disclosed (Bd. br., p. 31).[7] Conspicuously absent from this private equation is the *public* interest. The Company is a large regulated public utility. There is a significant public interest, quite apart from the normal frictions of union-employer relations, in having only qualified employees on this job of critical importance to the public. Any balancing of private interests is woefully shortsighted if it contains the ingredients that could result in an unqualified person becoming an instrument man.

[7] In the conclusion of this Company's opening brief, the Company demonstrated other important interests the Board failed to appreciate in ordering disclosure of the test materials.

The Board's "balance" contains those ingredients.

Respectfully submitted,

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